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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

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7 UNITED STATES OF AMERICA,
8 Plaintiff,

Case No. 2:06-cr-00274-KJD-LRL
2:13-cv-01824-KJD-LRL

9 v.

ORDER

10 EDMUND C. BOTHA,
11 Defendant.

12
13 Before the Court is Movant Edmund C. Botha's ("Botha") Motion under 28 U.S.C. §
14 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (#147). Also
15 before the Court are Botha's Motions for Appointment of Counsel (#148/#149).

16 I. Background

17 On September 25, 2008, Botha was found guilty of willful evasion of payment of income
18 tax under 26 U.S.C. § 7201. This Court sentenced him to 60 months in prison on July 17, 2009.
19 Botha filed a direct appeal on July 17, 2009, appealing both his conviction and sentence. The
20 Ninth Circuit Court of Appeals affirmed this Court's judgment on March 2, 2012. Botha filed a
21 petition for a writ of certiorari with the Supreme Court of the United States on July 18, 2012.
22 The Supreme Court of the United States denied Botha's petition for a writ of certiorari on
23 October 1, 2012. Botha filed the present motion on October 4, 2013.

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1 II. Standard of Review

2 28 U.S.C. § 2255 allows:

3 A prisoner in custody under sentence of a court established by Act of Congress
4 claiming the right to be released upon the ground that the sentence was imposed
5 in violation of the Constitution or laws of the United States . . . [to] move the
6 court which imposed the sentence to vacate, set aside or correct the sentence.

7 28 U.S.C. § 2255(a). However, the Ninth Circuit has repeatedly held that “[i]ssues disposed of
8 on a previous direct appeal are not reviewable in a subsequent [§] 2255 proceeding.” United
9 States v. Currie, 589 F.2d 993, 995 (9th Cir. 1979); Odom v. United States, 455 F.2d 159, 160
10 (9th Cir. 1972); Stein v. United States, 390 F.2d 625, 626 (9th Cir. 1968).

11 III. Analysis

12 Botha’s § 2255 motion consists of several claims: (1) the Court’s failure to read to the
13 jury Botha’s instruction as to the *mens rea* requirement of willfulness violated Botha’s 5th
14 Amendment right to present his theory of defense; (2) Botha’s conviction should be reversed as
15 prosecution repeatedly made untrue statements in opening and closing arguments and during the
16 main body of the case; (3) Botha’s 5th Amendment Due Process rights were violated by the
17 prosecutions’ supposed “loss” and failure to turn over key, critical evidence; (4) the Court
18 imposed an unreasonable sentence for failing to consider all the circumstances unique to Botha’s
19 situation; and (5) the Court failed to grant a reduction of sentence for Botha’s acceptance of
20 responsibility. (#147 at 5-8). The Court will address each claim in turn.

21 A. Botha’s Theory of Defense Claim

22 Botha claims that his ability to argue his theory of defense was deprived when the Court
23 refused to provide his requested jury instruction regarding “willfulness.” However, the Ninth
24 Circuit, on direct appeal, already rejected Botha’s claim that his ability to argue his theory of
25 defense was deprived when the Court refused to provide his requested jury instruction regarding
26 “willfulness.” United States v. Botha, 470 F. App’x 575, 576-77 (9th Cir. 2012). The Court of

1 Appeals held that (1) the instructions were adequate; (2) that the Court provided a legally correct
2 definition of the term “willfully”, as well as a “good faith” instruction in substantially the same
3 form Botha requested; and (3) read together, the instructions adequately covered Botha’s defense
4 theory. Id. at 577. Since review under § 2255 is not available to claims that have been
5 previously rejected on their merits on direct appeal, this claim is not reviewable.

6 B. Botha’s Prosecutorial Misconduct Claim

7 Botha next claims that the prosecution engaged in misconduct by repeatedly lying about
8 Botha’s unpaid taxes in opening and closing arguments and in the main body of the case.
9 However, the Ninth Circuit, on direct appeal, already rejected Botha’s claim that the prosecution
10 engaged in misconduct by repeatedly lying in opening and closing arguments and in the main
11 body of the case. Id. The Court of Appeals held that the comments made by the prosecution,
12 read in context of the entire case, did not affect the jury’s ability to consider the evidence fairly
13 such that it deprived Botha of a fair trial. Id. Since review under § 2255 is not available to
14 claims that have been previously rejected on their merits on direct appeal, this claim is not
15 reviewable.

16 C. Botha’s “Loss” of Exculpatory Evidence Claim

17 Botha asserts in his third claim that the government lost and/or destroyed potentially
18 exculpatory evidence. However, the Ninth Circuit, on direct appeal, already rejected Botha’s
19 claim that the government misplaced or destroyed potentially exculpatory evidence. Id. The
20 Court of Appeals held that the record contains no evidence of bad faith destruction and that such
21 evidence was either accidentally misplaced or destroyed for innocent reasons. Id. Since review
22 under § 2255 is not available to claims that have been previously rejected on their merits on
23 direct appeal, this claim is not reviewable.

24 D. Botha’s Unreasonable Sentence Claim

25 Botha’s fourth claim asserts that the Court imposed an unreasonable sentence for failing
26 to consider all the circumstances unique to Botha’s situation. However, the Ninth Circuit, on

1 direct appeal, already rejected Botha's claim that the Court imposed an unreasonable sentence
2 for failing to consider all the circumstances unique to Botha's situation. Id. at 578. The Court of
3 Appeals held that the Court correctly calculated a guideline sentence and reached a conclusion
4 reasonably supported by the circumstances. Id. Since review under § 2255 is not available to
5 claims that have been previously rejected on their merits on direct appeal, this claim is not
6 reviewable.

7 E. Botha's Reduction of Sentence Claim

8 Botha's final claim asserts that the Court failed to grant a reduction of sentence for
9 Botha's acceptance of responsibility. However, the Ninth Circuit, on direct appeal, already
10 rejected Botha's claim that the Court failed to grant a reduction of sentence for Botha's
11 acceptance of responsibility. Id. The Court of Appeals held that the Court correctly focused on
12 Botha's pretrial conduct in denying the reduction. Id. Since review under § 2255 is not
13 available to claims that have been previously rejected on their merits on direct appeal, this claim
14 is not reviewable.

15 F. Botha's Motions for Appointment of Counsel

16 An indigent petitioner seeking relief under 28 U.S.C. § 2255 may move the court for
17 appointment of representation to pursue that relief. 18 U.S.C.A. § 3006A(a)(2)(B). The court
18 has discretion to appoint counsel when the interest of justice so requires. 18 U.S.C.A. §
19 3006A(a)(2). The interest of justice so requires where the complexities of the case are such that
20 denial of counsel would amount to a denial of due process. See Brown v. United States, 623
21 F.2d 54, 61 (9th Cir. 1980).

22 Here, the Court has reviewed the documents and pleadings on file in this matter and finds
23 that appointment of counsel is not warranted. Although the claims raised in Botha's underlying
24 § 2255 may be complex, denial of counsel would not deprive Botha of due process. The Ninth
25 Circuit, on direct appeal, already rejected all of Botha's § 2255 claims on their merits. Thus,
26 Botha was afforded due process in regards to all the claims raised in the present motion.

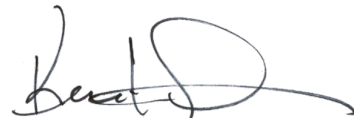
1 Therefore, the Court finds that Botha is not entitled to appointed counsel.

2 III. Conclusion

3 Accordingly, **IT IS HEREBY ORDERED** that Botha's Motion under 28 U.S.C. § 2255
4 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (#147) is **DENIED**;

5 **IT IS FURTHER ORDERED** that Botha's Motions for Appointment of Counsel
6 (#148/#149) are **DENIED**.

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8 DATED this 7th day of July 2014.

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11 Kent J. Dawson
12 Senior United States District Judge
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